

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RONALD J. RANKIN and)	
LIZ RANKIN,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 01-45-B-K
)	
RIGHT ON TIME MOVING &)	
STORAGE, INC., et al.,)	
)	
Defendants)	

MEMORANDUM OF DECISION¹

Right On Time Moving & Storage, Inc. (“Right-On-Time”), moves for partial summary judgment on Count I and summary judgment on Count II. The Rankins’ Count I alleges that Right-On-Time is liable pursuant to the Carmack Amendment for property damages and loss that occurred as a result of Right-On-Time’s moving services. Right-On-Time seeks an order establishing that its liability is limited to the amount it claims the parties agreed to by contract. Count II alleges that the Rankins suffered from negligent and/or intentional infliction of emotional distress arising from the conduct of Right-On-Time’s agent, SI Trucking. Right-On-Time seeks summary judgment on Count II on the grounds that the Carmack Amendment preempts Count II and the conduct does not meet the legal standards for recovery. I **DENY** Right-On-Time’s motion on Count I and **GRANT** Right-On-Time’s motion for summary judgment on Count II.

¹ Pursuant to Federal Rule of Civil Procedure 73(b) the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

Summary Judgment Standard

Summary judgment is appropriate when the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is “material” when it has the “potential to affect the outcome of the suit under the applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A “genuine issue” exists when the evidence is “sufficient to support rational resolution of the point in favor of either party.” Id. Summary judgment should be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Facts

Plaintiffs Ronald and Liz Rankin, California residents, contacted a California moving company, Defendant Right On Time Moving and Storage, Inc., in late May or early July 2000, to move the contents of their California home to their new home in Maine. The parties agreed to certain charges for services, including \$420 for packing, \$75 for climbing one set of stairs; and sixty cents per pound for the moving service. Right-On-Time informed the Rankins that goods are weighed on the day they are picked up and that the weight total is derived by subtracting the known weight of Right-On-Time’s empty truck from the weight of the loaded truck.

Before entering into the contract, Right-On-Time gave the Rankins the option of declaring the actual value of their property and purchasing coverage for that value. Further, the Rankins were given the option of releasing the shipment to a maximum value

of \$1.25 per pound if they paid an insurance premium. At some point the Rankins consulted with their homeowner insurer, co-defendant Allstate Insurance Company (“Allstate”) and were informed that the Rankins’ existing homeowners’ policy would cover their goods during the move. In a letter dated June 7, 2000, Mr. Rankin thanked the Allstate representative for saving them \$700 they otherwise would have spent on additional insurance. Subsequently, on June 16, 2000, the Rankins entered into a written contract with Right-On-Time for their moving service. The parties refer to the written contract as a Bill of Lading. On the Bill of Lading, the Rankins did not declare a value greater than the minimum sixty cents per pound nor did they seek additional insurance from Right-On-Time. Right-On-Time claims that in the Bill of Lading section designated for the shipper to declare the value of goods, Mr. Rankin signed his name and wrote “.60 / lbs” thereby releasing the entire shipment to a value not to exceed sixty cents per pound. According to the affidavit of Antoinette Arvizo, the language involving the limitation of liability contained in the Bill of Lading conforms to the limitation language contained in the 400M Tariff.² The 400M Tariff expressly provides for the limitation of liability by a carrier of household goods to a value established by the shipper’s written declaration or by another form of written agreement.

² A “tariff” is a public document setting forth the services of the carrier being offered, the rates and charges with respect to the services and the governing rules, regulations and practices relating to those services. International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 433 F. Supp. 352, 357 n.4 (M.D. Fla. 1975). The 400M Tariff is filed with the court as Ex. 9 in support of Defendant’s Motion for Partial Summary Judgment. It is a 216 page document, accompanied by revisions and addendum, totaling in excess of 300 +/- pages. Apparently the 400M Tariff is prepared by the Household Goods Carriers’ Bureau Committee, an industry-wide agent. The exhibit is referenced in the Defendant’s Statements of Material Facts only in ¶ 33 and is mentioned only in the Arvizo Affidavit. Furthermore, in its reply memorandum to Plaintiff’s objection to the motion, Right-On-Time explains that the 400M Tariff complies with federal regulations, again without providing any citation to the document.

On June 16, 2000, the same day the Bill of Lading was allegedly signed, Right-On-Time's employees were at the Rankins' San Jose, California home picking up the Rankins' household belongings. The Rankins were so pleased with Right-On-Time's service that day that they stated in a survey form that Right-On-Time provided the best service they had experienced from a moving company. After loading the truck, Right-On-Time did not weigh the Rankins' property but instead provided the Rankins with an estimate of 9,000 pounds. After picking up the Rankins' household belongings on June 16, Right-On-Time placed the belongings in its warehouse until it was time to deliver them to Maine.

At some point, Right-On-Time realized it did not have enough trucks to move the Rankins' property across the country at the time required. Although Right-On-Time had affirmatively represented to Mr. Rankin that it would be transporting the property to Maine, Right-On-Time subcontracted with SI Trucking to perform the cross-country transport. On July 18, 2000, SI Trucking weighed their empty truck, picked up the Rankins' possessions from Right-On-Time's warehouse, weighed the loaded truck, and entered an amount of 14,520 pounds on the Bill of Lading. This amount ultimately became the figure used to calculate the moving service. Based on the sixty cents per pound term, the Rankins were charged \$8,712 for the moving service.

On July 24, 2000, SI Trucking employees arrived at the Rankins' new house in Maine, in an SI Trucking truck, and demanded payment for the balance owed on the delivery. After payment, the SI Trucking employees opened the truck door and began unloading the Rankins' property. It immediately became apparent to the Rankins that a lot of their property was damaged. It came to light that when SI Trucking loaded the

Rankins' property, it also loaded two other loads of property, placing the Rankins' property in the middle. The last property loaded was delivered prior to the Rankins' delivery. SI Trucking's failure to properly secure the property after delivering the other load apparently caused the Rankins' property to topple over inside the truck during transport. When the Rankins questioned how such severe damages could have occurred, the SI Trucking crew told them it was no surprise, considering that their items were garbage. They told the Rankins that if their belongings were quality items, they would not have been damaged. As the truck was being unloaded, the Rankins discovered that many of the items they shipped were not on the truck and some items were missing from their moving boxes.

While unloading the truck, the SI Trucking employees improperly moved the Rankins' property by dropping items and otherwise damaging property through rough handling. The SI employees caused damage to the interior of the house by banging items into walls as they carried them in. They refused to follow instructions as to the placement of boxes and furniture within the house and complained constantly during the unloading process. One crew member brought an eight or nine year old girl who climbed on the Rankins' furniture and scratched their vanity by spinning it on the blacktop. Mr. Rankin witnessed the SI crew drop a four-drawer file cabinet on the ground, whereupon two drawers opened and the files fell out. The crew looked around and rapidly stuffed the files back in the cabinet, hoping the Rankins would not see the incident. Later, Mr. Rankin had to pull grass and dirt out of the file cabinet.

In addition to this conduct, the SI employees were rude to the Rankins; they made disparaging comments about their property and confronted the Rankins in a belligerent

manner. For example, Oren, one of the SI Trucking employees, upset the Rankins by characterizing their property as cheap and of poor quality. The Rankins thought he was on drugs because he mentioned going to Thailand to get good drugs. He also screamed repeatedly and, at one point, yelled at Mrs. Rankin while placing his face within inches of hers. Mrs. Rankin attempted to back away from him, but he continued to yell at her for approximately twenty seconds. Mrs. Rankin felt very threatened by this encounter and Mr. Rankin was very upset by Oren's actions towards Mrs. Rankin. After this incident, it took Mrs. Rankin an hour to stop shaking and to relax so she could go on with the day. She stayed with her husband the remainder of the day to avoid being alone with Oren. However, later in the day Oren again yelled at Mrs. Rankin. This time a fellow crew member hit Oren in the chest and told him to shut up. All told, Oren made approximately six upsetting statements to the Rankins. Mrs. Rankin felt like a prisoner in her own home the entire day.

Mr. Rankin called Right-On-Time three times that day to report the damages and the behavior of the SI Trucking crew. The Rankins allege that Mr. Morris of Right-On-Time stated that he would check into what happened to their missing belongings and that the least Right-On-Time could do was refund the moving fee. Mr. Rankin faxed a list of damaged items, as Right-On-Time had requested. The detailed synopsis contained sixty-five pages and included photographs. Subsequently, Mr. Rankin attempted at least a dozen times to reach Mr. Morris, but Mr. Morris never returned his calls and did not refund the moving fee. At one point, Antoinette Garcia of Right-On-Time called Mr. Rankin and informed him that Right-On-Time was going to take care of the Rankins'

claim by sending a check for \$1,200. However, Mr. Rankin never heard back from Ms. Garcia and never received a check from Right-On-Time.

Prior to their move, the Rankins were happy to be leaving California and starting their new life in Maine. However, as a result of the events surrounding the move, the Rankins have experienced sleeplessness, horrendous disappointment, and betrayal. Their house looks like a warehouse because they are unable to unpack boxes due to the loss of furniture that holds some of the belongings. They have had to avoid walking into boxes that remain in the house. The house is in a condition that prevents them from having the social life they want to have.

Mr. Rankin has found it very stressful to make the house more livable. Mr. Rankin's emotional distress also stems from his inability to make his house a home because of the loss of property, the inability to replace items, and the fact that so much time has passed. The Rankins were unable to start their business because Mr. Rankin could not demonstrate the product he sold without his demonstration board, which was never delivered. Mr. Rankin was very upset that Right-On-Time gave their household goods to SI Trucking and that Right-On-Time did not inform them of this arrangement until SI Trucking was on the road. Right-On-Time had never subcontracted jobs to SI Trucking before the Rankins' move and terminated their services after the Rankins submitted their claim for damages. Incidentally, Oren admitted to Right-On-Time that he was to blame for some of the property damage.

Mrs. Rankin was upset by the loss and destruction of half of their belongings. She had emotional attachments to some of the furniture that was destroyed, as some of the items had belonged to her grandmother and some had been picked out by her father

when he was dying. Aside from being upset, Mrs. Rankin has suffered general depression as a result of the events surrounding their move. In 1994, Mrs. Rankin was diagnosed with multiple sclerosis and since their move to Maine, Mr. Rankin has observed significant changes in her health. Mr. Rankin believes these changes are related to the stress that Mrs. Rankin suffered as a result of the events surrounding their move. These changes include sleeplessness, nervousness, jumpiness, shakiness, difficulty with speech, and deterioration in her ability to walk, think, and recall. Mr. Rankin has also noticed that since their move to Maine his wife cries frequently and has become moody and depressed. Neither Mr. Rankin nor Mrs. Rankin sought any kind of psychological services or intervention because of any alleged emotional distress caused by the events.

Discussion

A. Notice Regarding the Affirmative Defense

The Rankins claim they have not been given sufficient notice of Right-On-Time's limited liability defense because Right-On-Time's affirmative defense states there is a contractual "bar," not a liability limitation. However, in answering plaintiffs' interrogatory, Right-On-Time explained that its defense was based on the fact that the Rankins contracted with Right-On-Time for the transport of their property with a limited liability release value of sixty cents per pound per damaged or lost article, therefore all claims exceeding this limitation are barred by contract. (Def.'s Answer 25 to Pls.' Interrog..) Given that the Rankins acknowledge in their motion and statement of facts that they contracted for moving services and that the contract involved the option of limiting Right-On-Time's liability for property loss or damage, I find that the affirmative defense and the subsequent answer to plaintiffs' interrogatory sufficiently put the

Rankins on notice that Right-On-Time was relying on the limitation of liability contained in the contract, which the parties refer to as the Bill of Lading.

B. Right-On-Time's Limitation of Liability Defense

The Rankins' Count I claim seeks recovery under 49 U.S.C. § 14706 of the Carmack Amendment for property damage and loss incurred during interstate transport by Right-On-Time. The Carmack Amendment to the Interstate Commerce Act governs the liability of motor carriers for claims of property damage or loss during interstate transport. Camar Corp. v. Preston Trucking Co., Inc., 221 F.3d 271, 274 (1st Cir. 2000). Right-On-Time, conceding it is a motor carrier subject to the Carmack Amendment, moves for partial summary judgment on Count I seeking an order establishing the maximum damages for which Right-On-Time can be liable under the limited liability terms of the Bill of Lading. The parties disagree on two points: whether Right-On-Time's rates for limited liability have been approved by the Surface Transportation Board and whether Right-On-Time's 400M Tariff has any legal effect.

1. Board Approval for Limited Liability Rate

The Carmack Amendment makes motor carriers generally liable for actual loss or injury to property in transport. 49 U.S.C. § 14706(a)(1). However, subsection (f) provides that carriers may petition the Surface Transportation Board to "modify, eliminate, or establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement." 49 U.S.C. § 14706(f). In 1995, changes to the Carmack Amendment were adopted, one of which took the power of the Interstate Commerce Commission ("I.C.C.") and transferred it to the Surface

Transportation Board. See Owner-Operator Indep. Drivers Ass’n, Inc. v. New Prime, Inc., 192 F.3d 778, 780 (8th Cir. 1999); I.C.C. Termination Act of 1995, Pub. Law 104-88, Title I, § 103, Dec. 29, 1995, 109 Stat. 907. Prior to the termination of the I.C.C.’s authority, the I.C.C. approved a liability limitation for motor carriers of household goods at the rate of sixty cents per pound per article. See Released Rates of Motor Common Carriers of Household Goods, I.C.C. Released Rates Decision No. MC-999, 9 I.C.C.2d 523, 523 (March 30, 1993) (hereinafter “MC-999”). Initially it appeared that the I.C.C.’s approval applied only to members of the Household Goods Carriers’ Bureau, Inc., thus the I.C.C. subsequently clarified that its approval of the sixty cents per pound liability limitation extends to all carriers of household goods. (See Ex. Attached to Def.’s Reply Mot. Summ. J. (DRMSJ), I.C.C. Amendment No. 1 to MC-999 (June 10, 1994).) The I.C.C. ordered that carriers could not increase or decrease this approved liability limitation without seeking authority from the I.C.C.. See MC-999 at 525.

Based on this historical account, Right-On-Time argues that its limited liability rate has been approved. As Right-On-Time suggests, MC-999 made independent application to the I.C.C. (now the Surface Transportation Board) no longer necessary so long as the carrier’s tariff meets the requirements of MC-999. At this point Right-On-Time’s motion begins to lose steam.

The I.C.C.’s approval for the liability limitation of sixty cents per pound (also referred to as “release rate”) was not granted unconditionally.³ First, the release rate is

³ In a 1997 final rule, the Surface Transportation Board recognizes the regulations that have been promulgated by the I.C.C. over the years and that have been incorporated in existing tariffs. See Household Goods Tariffs, No. 555, 2 S.T.B. 21, 1997 STB 20, *2 (Jan. 22, 1997). The Board indicates that carriers limiting liability under the prior I.C.C. authorization must follow the requirements included in the authorization. Id. at *8.

only applicable when the value of the property is agreed upon in writing as the released value. See MC-999 at 524-525. The writing here is the Bill of Lading, however, the record I have before me does not establish that Mr. Rankin was indeed the person who wrote “.60 / lbs” and signed his name on the Bill of Lading. In objection to Right-On-Time’s statement of fact that Mr. Rankin signed the Bill of Lading (DSMF ¶ 5), the Rankins argue that the supporting affidavit fails to show personal knowledge. Right-On-Time responds that the Bill of Lading speaks for itself. True enough, but what does it say about a written declaration of value by Mr. Rankin? Although the statements of material fact establish that Mr. Rankin was aware of the limitation of liability and the options that were available, they do not contain record evidence that he signed the Bill of Lading. The document itself is illegible as to signature and MC-999 requires the value of the property declared by the shipper in writing. While the Arvizo affidavit is competent to establish the admissibility of the Bill of Lading as a business record, it is completely silent about the normal and customary circumstances under which the business record was generated. For all I know based on the record before me, the .60/lb. declaration of value and the scribble below it could have been written by one of the carrier’s agents, not by Mr. Rankin.

The second and third I.C.C. requirements mandate that carriers shipping household goods subject to the sixty cents per pound release rate must issue a Bill of Lading or service order that on its face contains the following provisions in this order:

Unless the shipper expressly releases the shipment to a value of 60¢ per pound per article, the carrier’s maximum liability for loss and damage shall be either the lump sum value declared by the shipper or an amount equal to \$1.25 for each pound of weight in the shipment, whichever is greater.

The shipment will move subject to the rules and conditions of the carrier's tariff. Shipper hereby releases the entire shipment to a value not exceeding

(to be completed by the person signing below)

NOTICE: THE SHIPPER SIGNING THIS CONTRACT MUST INSERT IN THE SPACE ABOVE, IN HIS OWN HANDWRITING EITHER HIS DECLARATION OF THE ACTUAL VALUE OF THE SHIPMENT, OR THE WORDS "60¢ per pound per article." OTHERWISE, THE SHIPMENT WILL BE DEEMED RELEASED TO A MAXIMUM VALUE EQUAL TO \$1.25 TIMES THE WEIGHT OF THE SHIPMENT IN POUNDS.

(Shipper)

(Date)

Id. at 525-526; (See also Ex. Attached to DRMSJ, I.C.C. Amendment No. 3 to MC-999 (October 5, 1995) (allowing orders for service to be used in place of Bill of Lading.)

As both parties refer to the Bill of Lading, which is a one-page document containing certain terms for the moving service, a reasonable inference can be drawn that Right-On-Time issued a Bill of Lading. The provisions stated above appear on the face of the Bill of Lading in the required order. (See Def.'s Mot. Summ. J. (DMSJ) Ex. 3.)

Fourth, the I.C.C. requires Tariff provisions that are published in accordance with the MC-999 decision to make reference to or state the following:

Rates or charges herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Decision No. MC-999 of April 6, 1993, subject to complaint or suspension.

Id.

There is no dispute that the 400M Tariff expressly provides for the limitation of liability of a carrier of household goods.⁴ (Def.’s Statement of Material Facts (DSMF) ¶ 33; Pls.’ Resp. to Statement of Material Facts (PRSMF) ¶ 33; DMSJ Ex. 6 at 15, 16-18.) The portion of the Tariff that discusses liability limits includes the required statement. (See DMSJ Ex. 6 at 18.)

So long as the carrier has meet these four conditions, the carrier’s limitation of liability is considered approved by the I.C.C. or by their successor, the Surface Transportation Board. Viewing the record in the light most favorable to the Rankins, I find there exists a disputed material fact regarding only the first element: whether the value of the property is agreed upon in writing by the shipper as the released value. Right-On-Time’s failure to establish in the record that the signature on the Bill of Lading is Mr. Rankin’s signature could be remedied by either citation to an admission by the Rankins or by testimony from someone with knowledge as to how a bill of lading is completed. The statements of fact I have before me are silent on either score.

2. Legal Effectiveness of Right-On-Time’s Tariff

Before a limitation of liability can become effective against a shipper, the carrier has the burden of establishing that it “(1) maintain[s] a tariff in compliance with the

⁴ The Rankins argue there is no basis for admission of the 400M Tariff as it is not referenced in the Arvizo affidavit as a document within Right-On-Time’s business records. However, I find the statements in Arvizo’s affidavit sufficient to establish admissibility. (See Arvizo Aff. at ¶¶ 2, 18)(stating she has access to Right-On-Time’s regular business records that pertain to this litigation and that exhibit six is a true and accurate copy of the 400M Tariff.) The Rankins’ primary concern regarding the admissibility arises from their perception that since the I.C.C. Termination Act of 1995, certain tariffs have “no effect apart from their status as contracts.” (PRMSJ at 5-6.) However, the changes effecting tariffs in the Termination Act did not have the same impact on tariffs for household goods carriers. Motor carriers of household goods are required to maintain (but no longer file) a published tariff. See 49 U.S.C. § 13702(a) and (c). The effectiveness of the tariff is not relevant in answering the immediate question of whether the Tariff includes the I.C.C.’s required statement. However, the legal effectiveness of Right-On-Time’s 400M Tariff is relevant to this litigation and is addressed in the next section as a separate issue.

requirements of the [Surface Transportation Board⁵]; (2) [gave] the shipper a reasonable opportunity to choose between two or more levels of liability; (3) obtain[ed] the shipper's agreement as to his choice of carrier liability limit; and (4) issue[d] a bill of lading prior to moving the shipment that reflects any such agreement.” Hughes Aircraft Co. v. North Am. Van Lines, Inc., 970 F.2d 609, 611-612 (9th Cir. 1992); Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1415 (7th Cir. 1987), cert. denied, 485 U.S. 913 (1988). Right-On-Time has the burden of proving that it has complied with these requirements. Hughes Aircraft Co., 970 F.2d at 612.

The first requirement addresses the Rankins' concern regarding the legal effectiveness of Right-On-Time's 400M Tariff. As this matter involves the transport of household goods, the relevant Surface Transportation Board tariff requirements are found in 49 C.F.R. §§ 1310.1 -.6 (1997). See 49 C.F.R. §1310.1(a). Although Right-On-Time carries the burden of establishing the elements of its defense (Hughes Aircraft Co., 970 F.2d at 612), it neglected to address this element until challenged by the Rankins' opposition to summary judgment. In its reply, Right-On-Time, for the first time, addresses this element and argues that it meets the tariff requirements of 49 U.S.C. § 13702(c), which to some extent are similar to the Board's requirements.⁶ (DRMSJ at

⁵ As the I.C.C.'s power has been transferred to the Surface Transportation Board, the first portion of the test reflects this change. See Mayflower Transit, Inc. v. Davenport, 714 N.E.2d 794, 799 (Ind. App. 1999). See also I.C.C. Termination Act, Pub. L. No. 104-88, § 201, 109 Stat. 803, 932-934 (1995).

⁶ Section 13702(c) states that a carrier cannot enforce any provisions of its tariff against a shipper unless the carrier has complied with the tariff requirements of § 13702(c). The Surface Transportation Board's requirements include the requirements of § 13702(c), but add further requirements. See 49 C.F.R. §§ 1310.1 -1310.6 (1997); 62 Fed. Reg. 5171 (Feb. 4, 1997). For example § 1310.3 states that tariffs "...must include an accurate description of the services offered to the public; must provide the specific applicable rates, charges and service terms; and must be arranged in a way that allows for the determination of the exact rate, charges and service terms applicable to any given shipment." Right-On-Time has not indicated where, in the 216 page Tariff, one may find this information nor has Right-On-Time addressed these requirements. Thus, Right-On-Time has not established that its tariff meets the Surface Transportation Board's requirements. See Dist. Me. Loc. Rule 56(e)(stating that the court has "...no

4.) Accompanying their reply memorandum is a second Arvizo affidavit that Right-On-Time attempts to add to the record in order to establish its compliance with § 13702(c). In its effort to show compliance, Right-On-Time asserts facts in its memorandum drawn from the second Arvizo affidavit that are not included in their statement of material facts. (See DRMSJ at 4.) The Rankins have no opportunity to respond to these additional facts. Consideration of these belated new facts would contravene Local Rule 56. This situation is particularly troublesome in a case such as this one where the party moving for partial summary judgment has the burden of proof on the issue upon which it seeks summary judgment. However, even if I incorporate these additional facts as presented by Right-On-Time in its memorandum, it still has not set forth record citations establishing full compliance with 49 C.F.R. §§ 1310.1 -.6 (1997).

Right-On-Time does meet the second and third elements. The record clearly reflects, and there is no dispute, that the Rankins were given the opportunity to choose between two or more levels of liability. Further, the parties agree that the Rankins did not seek additional insurance from Right-On-Time nor did they declare a value greater than the minimum sixty cents per pound. The Rankins consulted their Allstate agent and were informed that their homeowners' policy would cover their property during the move. Subsequently, Mr. Rankin wrote a letter to the agent thanking her for saving them \$700 they otherwise would have spent buying additional insurance. Thus, the record supports the conclusion that the Rankins were given the opportunity to choose between

independent duty to search or consider any part of the record not specifically referenced in the parties' statement of facts.").

two or more levels of liability, and that the Rankins made an informed choice to limit Right-On-Time's liability by not declaring a value greater than sixty cents per pound.

Right-On-Time has not established a portion of the fourth element. This element requires a company to issue a Bill of Lading that reflects the parties' agreement to limit liability. As stated before, the parties' various statements of material facts mention the Right-On-Time Bill of Lading, thus it can reasonably be inferred that Right-On-Time issued a Bill of Lading. However, as previously discussed, Right-On-Time has not established that the Rankins actually signed the Bill of Lading. As all reasonable inferences must be drawn in the light most favorable to the nonmoving party during summary judgment, there remains a question of material fact as to whether the Bill of Lading reflects the parties' agreement to limit liability.

Based on the record, Right-On-Time is not entitled to summary judgment on its limitation of liability affirmative defense because it has not established two of the four elements it carries the burden to prove. Accordingly, I deny Right-On-Time's request for partial summary judgment on Count I.⁷

⁷ The defendant's statement of material fact regarding the limited liability defense does not entitle it to partial summary judgment solely because of the issues relating to the adequacy of the signature on the Bill of Lading and the tariff's compliance with all the requirements of the Surface Transportation Board. Therefore I decline the Rankins' request to enter partial summary judgment in their favor sua sponte. Although the Rankins challenge the reasonableness of a sixty cents per pound liability limitation, I note that both the I.C.C. and the Surface Transportation Board have approved a sixty cents per pound limitation. See Released Rates of Motor Common Carriers of Household Good, Amendment No. 4 to Released Rated Decision No. MC-999, 2001 S.T.B. LEXIS 1003, *3, (Dec. 18, 2001) ("We are persuaded that we should permit the 60-cent liability limitation to be retained so that knowledgeable shippers who do not wish to pay for additional coverage can obtain the lowest possible base rates."). Right-On-Time correctly notes that the case law most often focuses upon whether the shipper has been offered a reasonable opportunity to choose between the released rate and a rate reflecting a higher level of liability. Camar Corp. v. Preston Trucking Co., Inc., 221 F.3d 271, 276 (1st Cir. 2000). On this record it is undisputed that Mr. Rankin knew he had that choice.

C. Infliction of Emotional Distress

1. Intentional Infliction of Emotional Distress

Right-On-Time seeks summary judgment on this claim on the basis that it is preempted by the Carmack Amendment. The Carmack Amendment preempts state or common law claims arising out of property loss or damage that occurred as a result of interstate transport. See Rini v. United Van Lines, Inc., 104 F.3d 502, 504-505 (1st Cir. 1997).

[W]e find that all state laws that impose liability on carriers based on the loss or damage of shipped goods are preempted. A state law “enlarges the responsibility of the carrier for loss or at all affects the ground of recovery, or the measure of recovery,” ... where, in the absence of an injury separate and apart from the loss or damage of goods, it increases the liability of the carrier. Preempted state law claims, therefore, include all liability stemming from damage or loss of goods, liability stemming from the claims process, and liability related to the payment of claims.

Id. at 506 (citing Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 596, 603 (1915)).

Courts are somewhat divided on whether the tort of intentional infliction of emotional distress is preempted under the Carmack Amendment. See Richter v. North Am. Van Line, Inc., 110 F.Supp.2d 406, 411 (D. Md. 2000) (citing cases). The First Circuit in at least one case has stated that the tort is not preempted. See Rini, 104 F.3d at 506. Where a claim for intentional infliction of emotional distress seeks liability arising from harms that are separate and apart from the property damage and loss, the claim would not be preempted. See id. Thus, to the extent that the Rankins’ claim seeks liability for emotional distress unrelated to the loss or damage of their property or the claims process, their claim is not preempted.

To establish a claim for intentional infliction of emotional distress, a plaintiff must show:

(1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it.

LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 511 (1st Cir. 1998) (citing Colford v. Chubb Life Ins. Co., 687 A.2d 606, 616 (Me. 1996)(citations and internal quotations omitted).

As an additional ground for their motion for summary judgment, Right-On-Time asserts that the facts do not meet the legal standards. First and foremost, I cannot consider the Rankins' statements indicating that they were emotionally distressed by "the entire experience of having [Right-On-Time] subcontract the carriage of the Rankins' household goods to SI Trucking without the Rankins' knowledge or consent" (PRMSJ at 7) and by Right-On-Time's failure to handle the Rankins' complaints or claim properly (i.e. failure to return phone calls and follow through on assurances). These statements all relate to the damage or loss of shipped property, the transport of property under a Bill of Lading, or to the handling of a subsequent claim, therefore they are not "separate and apart" from the Carmack Amendment's exclusive method of recovery. See Rini, 104 F.3d at 506 ("Preempted state law claims... include all liability stemming from damage or loss of goods, liability stemming from the claims process, and liability related to the payment of claims.").

The remaining conduct that is separate and apart from the claims process and the property damage or loss consists of yelling at Mrs. Rankin; damage inflicted to the Rankins' house;⁸ and the crew's talking about drugs in Thailand, complaining while unloading, and making disparaging remarks about the Rankins' property. The movers' conduct as averred by the Rankins is undisputed. Under Maine's jurisprudence, it is proper for a court on summary judgment to determine as a matter of law whether the undisputed facts constitute extreme and outrageous conduct. See Gray v. State, 624 A.2d 479, 484 (Me. 1993). Based on the undisputed record, I find that a reasonable jury could not find that the crew's talking about drugs in Thailand, criticizing the quality of the Rankins' property, and complaining while unloading the delivery truck is so outrageous that it exceeds all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community. Thus, the only conduct in which the Rankins' intentional infliction for emotional distress can be grounded is Oren's conduct, which involves his repeated screaming, his (approximately) six upsetting statements to Mrs. Rankin, and his yelling in Mrs. Rankin's face for about 20 seconds.

In its motion for summary judgment, Right-On-Time argues that the rude comments are not "extreme and outrageous as to exceed all possible bounds of decency" or "atrocious, and utterly intolerable in a civilized community." (DMSJ at 10.) Right-On-Time asserts there are no disputed facts as they agree that the mover acted in the manner the Rankins allege. When a moving party has made a preliminary showing that there is no genuine issue of material fact, the non-moving party seeking to overcome

⁸ It is possible that the movers' actions that caused damage to the house during the process of unloading may not be allowed under the Carmack Amendment to form the basis of a claim. See 49 U.S.C. § 13102(19)(B).

summary judgment must show there is a trialworthy issue by “affirmatively point[ing] to specific facts that demonstrate the existence of an authentic dispute”. McCarthy v. Northwest Airlines, 56 F.3d 313, 315 (1st Cir. 1995). This is especially true in cases such as the present where the non-moving party has the burden of proof at trial. See Int’l Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr., 103 F.3d 196, 200 (1st Cir. 1996). However, in response to the summary judgment motion, the Rankins do not offer facts showing there is a trialworthy issue.⁹ Based on the conduct described in the undisputed record and viewing the facts in a light most favorable to the Rankins as the non-moving party, I find that the facts do not rise to the level in which a reasonable jury could find extreme and outrageous conduct that exceeds all possible bounds of decency and which must be regarded as atrocious and utterly intolerable in a civilized community. Cf. Staples v. Bangor Hydro-Electric Co., 561 A.2d 499, 501 (Me. 1989)(finding no extreme and outrageous conduct where supervisor humiliated employee during staff meetings, demoted him without cause, and falsely accused him of professional incompetence); Colford v. Chubb Life Ins. Co. of Am., 687 A.2d 609, 617 (Me. 1996)(finding that defendant’s actions involving requiring plaintiff to submit to painful medical examination, attending plaintiff’s workers’ compensation hearing and communicating with opposing attorney, canceling plaintiff’s securities registration after making contrary assurances, and revoking the premium waiver on his life insurance causing him to lose insurance due to non-payment did not rise to the level of extreme and

⁹ It may be possible to find intentional infliction of emotional distress based on what Oren said to Mrs. Rankin, however, for reasons unknown, the Rankins did not provide the content of Oren’s statements.

outrageous conduct). Thus, summary judgment in favor of Right-On-Time is appropriate on the Rankins' claim for intentional infliction of emotional distress.

2. Negligent Infliction of Emotional Distress

Right-On-Time seeks summary judgment on the claim of negligent infliction of emotional distress on the basis that it is preempted by the Carmack Amendment and that the facts do not reach the legal standards. Although Rini indicates that the Carmack Amendment does not preempt a claim for intentional infliction of emotional distress in the First Circuit, there is no similar pronouncement regarding negligent infliction of emotional distress. Nonetheless, the Carmack Amendment does not preempt claims that involve harms to the shipper that are separate and apart from the loss or damage of goods. Rini, 104 F.3d at 506.

To establish a claim of negligent infliction of emotional distress, the plaintiff must establish that (1) the defendant was negligent; (2) "plaintiff suffered emotional distress that was a reasonably foreseeable result of defendants' negligent conduct;" and (3) "plaintiff suffered severe emotional distress" as a result of defendant's negligence. Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 129 (1st Cir. 2000). Further, the plaintiff must prove that the defendant violated a duty of care owed to the plaintiff. Id. at 130; See also Bryan R. v. Watchtower Bible & Tract Soc. of N.Y., Inc., 738 A.2d 839, 848 (Me.1999), cert. denied, 528 U.S. 1189 (2000). The question of whether a duty exists in these sorts of circumstances is always a matter of law to be determined in the first instance by the court. Cameron v. Pepin, 610 A.2d 279, 282 (Me. 1992). The Maine Law Court in Curtis v. Porter, 784 A.2d 18 (Me. 2001), noted that although people do not have a general duty to avoid negligently causing emotional harm to others, Maine recognizes

such a duty in three instances: in bystander liability claims, in cases where a special relationship exists between the parties involved, and when the actor has committed another tort. Curtis, 784 A.2d at 25-26.

In their supplemental memorandum, the Rankins concede that the present matter does not fall within the category of a bystander liability claim. Instead, the Rankins contend that their claim involves both a special relationship and an underlying tort. The Rankins argue there is a special relationship between common carriers and shippers that creates a higher duty upon the carrier. However, there is no case law cited indicating that Maine has recognized a special relationship between carriers and shippers. Maine has proceeded cautiously in finding such special relationships and thus far has only found a duty to avoid negligently causing emotional harm in very narrow categories. See, e.g., Veilleux, 206 F.3d at 131 (citing Bolton v. Caine, 584 A.2d 615, 618 (Me. 1990) (holding that a relationship between physician and patient gives rise to a duty to avoid emotional harm caused by failing to provide patient with critical information); Gammon v. Osteopathic Hosp. of Me., 534 A.2d 1282, 1285 (Me. 1987) (finding that a relationship between a hospital and the family of a decedent gives rise to a duty to avoid emotional harm in handling remains); Rowe v. Bennett, 514 A.2d 802, 806-07 (Me. 1986) (holding that the relationship between a psychotherapist and patient gives rise to a duty of care owed to the patient)). The relationship between shippers and motor carriers is different from the nature of the relationships in which Maine courts find a duty to avoid causing emotional harm.¹⁰ Cf. Veilleux, 206 F.3d at 131 (finding that the relationship between a

¹⁰ The Rankins also argue that section 48 of Restatement (Second) of Torts recognizes that a common carrier has a special relationship with its customers. Section 48 subjects common carriers and other public utilities to liability for gross insults to patrons because there is “a public interest in freedom from insult on the part of those who undertake the obligations of a public utility.” See Restatement

journalist and a potential subject “bears little resemblance” to the relationships involved in the cases where the Law Court has permitted recovery). For this reason, I reject the Rankins’ argument that the carrier-shipper relationship is a special relationship that gives rise to a duty to avoid causing emotional harm.

The Rankins also assert that they can recover for negligent infliction of emotional distress because Right-On-Time has committed another tort. A claim for negligent infliction of emotional distress “may lie when the wrongdoer has committed another tort.” Curtis, 784 A.2d at 26. The Rankins state that they were unable to include the other tort or torts in their complaint because the Carmack Amendment preempts such state law claims. Although the Rankins do not indicate the nature of these torts, they concede the claims would have been preempted. There is nothing in this record to support the conclusion that Right-On-Time could ever be found to have committed any other tort, and therefore liability for negligent infliction of emotional distress cannot be based upon that separate tort. Based on the foregoing, I conclude that summary judgment on Count II in favor of Right-On-Time is appropriate.

Conclusion

I find there are disputed facts regarding Right-On-Time’s limited liability defense thus Right-On-Time’s motion on Count I is **DENIED**. I **GRANT** Right-On-Time’s motion for summary judgment on Count II.

(Second) of Torts § 48 & comment (a) (1964). If section 48 is applicable under Maine law (plaintiff has cited no cases to that effect), Right-On-Time is a motor carrier that transports items, not passengers, therefore the concerns involved in § 48 are not present here.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated March 25, 2002

STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-45

RANKIN, et al v. RIGHT-ON-TIME MOVING, et al Filed: 03/02/01

Assigned to: MAG. JUDGE MARGARET J. KRAVCHUK ury demand: Both

Demand: \$200,000 Nature of Suit: 890

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 28:1331 Fed. Question: Breach of Contract

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JULIE D. FARR, ESQ. [COR LD NTC]

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JULIE D. FARR, ESQ. (See above) [COR LD NTC]

v.

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defendant [COR LD NTC]

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